No. 22694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Beverly Hills National Bank, a national banking association,

Appellant,

vs.

Compagnia de Navegacione Almirantl, S.A. Panama,

Appellee.

ANSWERING BRIEF OF APPELLEE

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I

INTRODUCTION AND SUMMARY OF THE CASE

It seems typical of arguments on appeal that the appellant must urge error in law and then take issue with the trial court's findings of fact. This case is no different. To a considerable extent, the Bank's[1] argument is one addressed to the trier of fact and is, to that extent, controlled by the rule of *McAllister v. United States* (1954) 348 U.S. 19. Without extending the length of this brief unduly, Compania can point to the following — all matters of fact — which limit and indeed undercut the predicate of the Bank's position:

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[1]Appellee will adopt the style used in the trial court and by appellant here: it will call itself "Compania" and appellant "the Bank".

1. Three defendants were before the trial court: the *in rem* respondent[2] "Proceeds", found to be within the court's jurisdiction [F. 19; R. 224]; the charterer Kenray, Inc., whose default was eventually entered [R. 170-71]; and the Bank.

2. Despite its claim in the court below, and by implication here, that this suit has never *really* been against it, the Bank was a named party in the original libel [R.2], which it answered for itself [R. 161]. The Bank was confronted squarely with the issue of its own liability in the pretrial conference order [Issues 14, 16, 19; R. 181-82] and was held severally liable for the full amount of the judgment [Concl. 11, 12; R. 228].

3. Although the court found that the bank was not a party to the charter of the SEARAVEN, it did *not* find the Bank was ignorant of the transaction. Indeed, the voyage was instigated by the Bank in an effort to liquidate its position in Kenray, a position which had resulted from a series of unprofitable scrap voyages and which reached a gross indebtedness the prior May in excess of $2,000,000 [R.T. 94]. The Bank knew and approved of the charter fixture [R. 220, 225]. It readily acceded to the suggestion that no letter of credit be offered as security for the SEARAVEN hire, *not* in the course of denying its intention to provide for the hire but so that no additional indebtedness would appear on its own books [F. 7, R. 220] — the SEARAVEN'S voyage was for its benefit [F. 26, R. 225].

4. The Bank makes no assertion that its right to the more than $500,000 it collected stands on maritime law. It is thus a non-admiralty claimant in an admiralty court. To the extent Compania's claim of maritime right is sustained, the Bank necessarily loses. Gilmore & Black, *Admiralty* 641 (1957).

[2]So styled under the admiralty practice prevailing in 1964 when suit was filed.

II

ISSUES PRESENTED

The following are the questions raised by this appeal:

1. Does an admiralty court, properly vested with jurisdiction of the subject matter and the parties, have jurisdiction to grant equitable relief?

2. Does an admiralty court have the *power,* and a maritime lienholder the *right,* to follow property into the hands of third persons in order to enforce the lien asserted?

3. To what extent can one who did *not* act in reliance on a shipowner's conduct or on statements in bills of lading issued by the shipowner claim an estoppel arising from the conduct and the statements?

4. Was the evidence before the trial court sufficient to justify the court's finding that appellant was constructive trustee of designated funds for the benefit of appellee?

5. Did the trial court have power to award prejudgment interest?

III

SUMMARY OF ARGUMENT

This case involves two principal points: enforcement of a maritime lien for unpaid charter hire and imposition of a constructive trust, the result of unjust enrichment. In seeking to enforce its maritime lien for unpaid hire, appellee Compania found monies within the trial court's jurisdiction, clearly identifiable as the proceeds of cargo,

freights and subfreights of SEARAVEN. These it seized under process *in rem*. These were ordered into court at a time when cargo represented by the proceeds was still in the vessel's possession. Viewing the fund as proceeds in part of cargo, the lower court correctly concluded there had been no unconditional release of the cargo itself until *after* the shipowner's lien was exercised. Viewing the fund as proceeds in part of freights, the lower court correctly concluded Compania was entitled to follow such monies beyond the hands of the consignees. Inasmuch as the Bank had full knowledge of the facts and circumstances of the voyage — and gave *no* value in exchange for the bills — it was not entitled to raise the equitable arguments of waiver and estoppel running in favor of a bona fide purchaser.

The constructive trust argument is essentially a factual one, as to which the court's findings are not contradicted by anything in the record. The court below properly found appellant would have been unjustly enriched had it not paid the hire earned by carriage of the scrap cargo for its benefit.

IV

THE TRIAL COURT PROPERLY EXERCISED ITS ADMIRALTY JURISDICTION

At the threshold of this appeal are two jurisdictional questions: Does an admiralty court have the power to trace funds beyond the hands of the payor? Does an admiralty court have the power to determine equitable questions presented in the course of deciding a controversy properly before it?

To both of these questions the Bank would answer no. The Bank is wrong.

1. The question of tracing is most easily dealt with. It is implicit in the Bank's argument that an admiralty court is powerless to determine rights in a fund once that fund has passed to a third person. No case is cited in the opening brief in support of such an argument. In dealing with the "tracing" cases the Bank asserts only factual distinctions and does not deal with the judicial *power* being exercised. It is perfectly clear in terms of such power that an admiralty court now is, and always has been, competent to trace monies through successive hands *so long as* the monies could be identified. *Lathrop vs. Freights of The JOHN ENA* (N.D.Cal. 1914) 212 Fed. 560; *Bank of British North America vs. Freights, etc., of The HUTTON* (2d Cir. 1905) 137 Fed. 534; The *SURICO* (W.D.Wash. 1930) 42 F.2d 935.

Here there is no doubt that the respondent "Proceeds"[3] constituted an identifiable corpus within the geographical jurisdiction of the court [F. 15, 19; Concl. 2; R. 223, 224, 226]. The narrow question remaining is a matter of priorities [discussed in section V, *infra*]. At this point it need only be recognized that the court below had clear jurisdiction over the *in rem* respondent.

2. The Bank likewise urges upon this Court the proposition that the trial court was powerless to pass on the equitable questions presented it.[4] Placing principal re-

[3]The entire proceeds $535,371.21 were ordered into court under the court's order to show cause and order denying exceptions [R. 755]. The parties subsequently stipulated to substitute deposit of $145,000 [R. 59, 184], which is more than the amount here in issue.

[4]In a sense this argument is moot. The record shows that the trial court could have exercised diversity jurisdiction had it been asked to do so. Transfer to the law side [for trial without jury of the equitable issues presented] would have been the only result of a finding by the court that it lacked admiralty jurisdiction on these issues.

liance on its interpretation of *Putnam vs. Lower* (9th Cir. 1956) 236 F.2d 561. The Bank contends in essence that, because the non-lien elements of this suit *could possibly* have formed the subject of a separate suit, they necessarily *must* be litigated separately. *Putnam* does not so hold: this court actually sustained a finding of jurisdiction. The following is part of the excerpt quoted by the Bank:

> "[H]aving once secured jurisdiction as an admiralty court, they [admiralty courts] may proceed in the trial of the cause on equitable principals." *Id.* at 568.

The Bank goes on to quote with approval the language of Judge Learned Hand speaking for the Second Circuit as follows:

> "That jurisdiction depends in our judgment altogether upon the cause of suit which the libelant brings before the court; if that be once maritime, the court may dispose of it completely without the need of any other suit in the same, or any other court; it is omnicompetent within its sphere."
>
> *Rice vs. Charles Dreifus Co.* (2d Cir. 1938) 96 F.2d 80, 83.

Putnam then states in conclusion:

> "Accordingly, where the original jurisdiction is maritime, a court of admiralty may entertain an issue of fraud, mistake, or other equitable claim, where either is alleged as affecting the rights of parties to a maritime action." 236 F.2d at 569.

The cases approving exercise of equitable powers by an admiralty court are myriad. Prominent among them are *Swift & Company Packers vs. Compania Colombiana del Caribe, S.A.* (1950) 339 U.S. 684, which the Bank apparently seeks to limit. Others include the following:

Archawski vs. Hanioti (1956) 350 U.S. 532 [action for restitution, following breach of a contract of passage, approved];

Sword Line, Inc. vs. United States (2d Cir. 1955) 228 F.2d 344, *aff'd on rehearing* (1956) 230 F.2d 75; *aff'd* (1956) 351 U.S. 976 [action to recover overpayment of hire, affirmed];

See also:

Gilmore & Black, *Admiralty* 26 n. 94:

> "[T]here is no warrant in history, venerable precedent, principle, or common sense for denying to the admiralty courts jurisdiction over the quasi-contractual claims. If the court is set up as the special industrial court of the shipping business, then obviously its expertness is just as much needed when the theory of action happens to be *quasi ex contractu* as at any other time."

Chandler, *"Quasi-Contractual Relief In Admiralty"*, 27 Mich. Law Rev. 23 (1928);

Comment, *"Present Status Of Quasi-Contractual Relief In Admiralty"*, 23 Calif. L. Rev. 343 (1935);

1 Benedict, *Admiralty* § 71 (6th ed. 1940);

Vaughan vs. Atkinson, 369 U.S. 528;

Krauss Bros. Lumber Co. vs. Dimon S.S. Corp. (1933) 290 U.S. 117;

International Refugee Organization vs. Maryland Drydock Co. (4th Cir. 1950) 179 F.2d 284, 287;

Van Camp Sea Food Co. vs. Dileva (9th Cir. 1948) 171 F.2d 454;

Gayner vs. The NEW ORLEANS (N.D. Cal. 1944) 54 F.Supp. 25, 28.

The BAY BELLE [*Port Welcome Cruises, Inc. vs. The BAY BELLE* (D.Md. 1963) 215 F.Supp. 72; *aff'd sub nom. Humble Oil & Ref. Co. vs. S.S. BAY BELLE* (4th Cir. 1963) 324 F.2d 954] can be readily distinguished from this case. The court there was asked to exercise its jurisdiction over a *res* not before it. As already pointed out, the *res* here was indisputably and quite properly before the court below. A decision not to *extend* physical jurisdiction to a *new res* is no authority for denying the capacity of a court which *already* has jurisdiction over the *res* in question to decide rights in that *res*.

As Judge Brown said in a typically colorful opinion speaking for the Fifth Circuit:

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels."
>
> *Compania Anonima Venezolana de Navegacion vs. A. J. Perez Export Co.* (5th Cir. 1962) 303 F.2d 692, 699.

V

THE TRIAL COURT PROPERLY ALLOWED COMPANIA TO ENFORCE ITS LIEN AGAINST THE FUNDS IN THE HANDS OF THE BANK.

The Bank likewise misconceives the nature of the lien which Compania seeks to enforce. It is, of course, basic law that a shipowner's lien for its hire is a *first priority* as against other maritime claimants. Numerous cases so hold; among them are:

Freights of The KATE (S.D. N.Y. 1894) 63 Fed. 707;

American Steel Barge Co. vs. Chesapeake & O. Coal Agency Co. (1st Cir. 1902) 115 Fed. 669;

The SOLHAUG (S.D. N.Y. 1931) 2 F. Supp. 294;

N. H. Shipping Corp. vs. Freights of The JACKIE HAUSE (S.D. N.Y. 1960) 181 F. Supp. 165;

American Smelting & Ref. Co. vs. Naviera Andes Peruana, S.A. (N.D. Cal. 1962) 208 F. Supp. 164; *aff'd sub nom. San Rafael Compania Naviera, S.A. vs. American Smelting & Ref. Co.* (9th Cir. 1964) 327 F.2d 581;

Luckenbach Overseas Corp. vs. The Sub-freights of The AUDREY J. LUCKENBACH (S.D. N.Y. 1963) 232 F. Supp. 572.

See also:

Gilmore & Black, *Admiralty* 517 (and cases collected at note 103);

Robinson, *Admiralty* 401-4.

The Bank attempts to distinguish these cases factually, but it offers no authority to denigrate Compania's prior right. The unquestioned recognition of this right makes irrelevant the reliance placed upon such cases as *Osaka Shosen Kaisha vs. Pacific Export Lumber Co.* (1923) 260 U.S. 490, and *Galban Lobo Trading Company S/A vs. Diponegaro* (S.D. N.Y. 1951) 103 F. Supp. 452. In each of these cases the alleged "lienor" sought to impose a maritime lien on a vessel for breach of contract to carry cargo. Both courts held such a lien had never existed: that the claimant had *no right at all.*

Turn then to the nature of the lien which Compania asserts. Paragraph 8 of the charter party [Exh. 1] reads as follows:

> "Owners shall have a lien on the cargo for freight, dead freight, demurrage . . ."

So far as Compania is aware, only one reported case has determined the extent of the *res* reached by this language. In *The JACKIE HAUSE* [*N.H. Shipping Corp. vs. Freights of The JACKIE HAUSE* (S.D. N.Y. 1960) 181 F. Supp. 165] the charter party before the court was reported to contain this language:

> "6. 'Vessel to have a lien on the cargo for all freight, dead freight, demurrage or average' ". 181 F. Supp. at 168.

The court specifically held that this lien clause gave the shipowner a lien, not only on the cargo, but also on the freight earned by the cargo. In doing so, the court said:

> "Much is attempted to be made by Stratford of the fact that N.H. Shipping Corp's lien is claimed now against 'freights' while the charter party reserved a lien on 'cargo' only but while this might be significant under other circumstances and under another charter party it is not here, for the 'freight' earned by the cargo represent (exclusive of commissions) the sum to be paid for the use of the ship and a lien on cargo when the vessel has not been paid its hire is a lien on the sum earned by the cargo." 181 F. Supp. at 170.

Accord: *Jebsen vs. A Cargo of Hemp* (D. Mass. 1915) 228 Fed. 143.

The Bank's argument that *The JACKIE HAUSE* is contrary to other recognized authority is incorrect. None of the cases it cites deal directly or indirectly with the quoted language. Each in fact *upheld* the shipowner's claim of lien on the strength of language in the charter party [e.g. *In re North Atlantic and Gulf S.S. Co.* (S.D.

N.Y. 1962) 204 F. Supp. 899].[5] Such cases, as well as textual authority relied on, are inapposite to the problem of interpreting language which does appear in the charter party now before this Court.[6]

It follows then that the charter party lien extends both to the cargo and to the "sum earned" by that cargo, i.e., the freights.[7] The next question is: *were* there any freights to which the shipowner's lien could attach? The Bank contends there were not, that none of the funds received were "clearly identifiable as subfreights". This argument (a factual one) is untenable. The sales documents are part of the record [Exh. 4 A-I]. They show a series of CIF sales. Robert Coughlin, vice president of Kenray, testified at trial that such a sale meant the buyer paid cost, insurance, and *freight,* and that *freight* was indeed part of the price [R.T. 45-46]. Had the Bank been serious in its present contention that "Kenray, in order to make the total deal, was itself absorbing the cost

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[5]*A/S Dampsk. Thorbjorn vs. Harrison & Co.* (S.D. N.Y. 1918) 260 Fed. 287 is an exception: the Bank has miscited it for the proposition put forward. The case in fact turns on good-faith payment by a subcharterer *before* receipt of the owner's notice of lien.

[6]The Bank's attempt to distinguish *The JACKIE HAUSE* factually on the basis of parity between the shipowner and consignee is likewise immaterial at this point: obviously, if the shipowner had a *contractual* right to the freight money, it would not need to resort to any lien right.

[7]The Bank consistently refers to the lien as being asserted against "subfreights". Analytically speaking, the lien was asserted against "freights" since the payment by charterer to shipowner was "hire" not "freight". This distinction should not affect analysis of the cited cases. The characteristic of the *res* is the same (i.e., payment for carriage by a stranger to the vessel) whether called subfreights as the Bank would or freights as the court did [F. 20; R. 224].

of the freight" [Op.Br. 28] it had the witness available to answer. It chose not to. The court's finding that there was freight and that its reasonable amount was $96,750 is not contested by any evidence the Bank offered.

Moreover, the Bank misses the point on the quasi-freight cases [*Whitney vs. Tibbol* (9th Cir. 1899) 93 Fed. 686; *Poland vs. The SPARTA* (D.Me. 1828) 19 Fed. Cas. 912 (No. 11,246); *Clifford vs. Merritt-Chapman & Scott Corp.* (5th Cir. 1932) 57 F.2d 1021; *Vlavianos vs. The CYPRUS* (4th Cir. 1948) 171 F.2d 435]. These were cited below to demonstrate the *power* of the trial court to carve out reasonable freights if it concluded none had been earned. The seaman's lien on freight money derives from the vessel's by *subrogation in law*. Hence the *power* to determine freights exists in the case at bar. Compania argued, and the court agreed, that the funds received by the Bank did indeed include freight monies. But the court chose, *in addition,* to exercise its power on the alternate assumption that no freights had been earned. Nothing the Bank presents shows this exercise was unreasonable.

This, in brief, is Compania's position: that its lien extends both to cargo and to the earnings of cargo, i.e., freights; and that, as the court found, there were indeed such freights earned by the cargo of SEARAVEN. The sole remaining question is whether Compania properly exercised its lien against cargo or against freights or both. In urging that it did not, the Bank sets out several propositions to which we now turn.

(a) The Bank first urges that delivery of the scrap cargo at Taiwan was so unconditional as to constitute waiver of Compania's lien. The court found that it was not [F. 224; R. 225]. Compania had in fact commenced suit, seized funds in the Bank's hands, and procured the

court's order for deposit [R. 7, 55] before *any* cargo was released to the consignees. Although the Bank purports to distinguish *The JACKIE HAUSE, supra,* it actually makes the same argument which was rejected there:

> "To say that the 'Jackie Hause' had no choice but to sit in a foreign port with the cargo in its hold or in a warehouse at its risk in order to protect its lien, disregards law and commonsense. The delivery of the cargo by N.H. Shipping Corp. did not effect that absolute and unconditional change of possession to the consignee sufficient to extinguish the vessel's lien for payment of its charter hire." 181 F. Supp. at 171 [citing *The MT. SHASTA,* 274 U.S. 466; *THE BIRD OF PARADISE,* 72 U.S. 545; *The VOLUNTEER,* 28 Fed. Cas. 1260 (No. 16991) (D.Mass. 1834); *McBrier vs. A Cargo of Hard Coal,* 69 Fed. 469 (D.Minn.); *Bank of British North America vs. The Freights of The HUTTON* (2d Cir.) 137 Fed. 534.]

The *Portland Flouring* case [*Portland Flouring Mills Co. vs. Portland & Asiatic S.S. Co.* (D. Ore. 1906) 145 Fed. 687) does not present the issue asserted by the Bank, nor is it dispositive on this point. The target respondent was the cargo underwriter, who obtained the proceeds of a salvage sale *after* the shipowner had abandoned both vessel and cargo to underwriters. The court *held* [at 694] that abandonment constituted a *waiver* of the shipowner's lien. No salvage proceeds existed until a point in time *after* the abandonment/waiver had occurred. If anything relevant is to be gained from the case and the language quoted[8] by the Bank, it is the negative inference

[8]"The lien being lost, the alleged fact, which must be taken as true, that the proceeds of the salved flour came into the Yokohama Specie Bank to the joint credit of the agents of the Portland & Asiatic and the assurance company, could not be effective to restore it, so that there is no lien upon such proceeds, into whosesoever hands they have come." 145 Fed. at 694.

that the shipowner's lien, as asserted by libelant, *would have* attached to the proceeds had the shipowner *not* waived it beforehand.

What the Bank urges is that SEARAVEN had no choice but to retain physical possession of the scrap cargo until hire was paid. This is simply not the law. Compania had the right to substitute securities so long as that security was acquired before release of the cargo. This it did: the court found that the $535,371.21 which Compania seized represented the proceeds from sale of the cargo [F. 12; R. 222].

(b) The Bank next speaks of an estoppel or waiver based upon the issuance of bills of lading marked prepaid. The bills of lading appear in the record in two batches [San Francisco, Exh. 2; Los Angeles, Exh. 3]. On the San Francisco bills appears the wording "Freight prepaid as per charter party". On the Los Angeles bills the words "Freight prepaid" appear on one side and the words "Terms and conditions as per charter party" appear in the text. Both are clearly types of charter party bills.[9] The Bank argues that the "prepaid" marking exonerates it from any duty it might otherwise have to pay hire, *although it gave no consideration in exchange for the bills.* It likewise argues, *pari passu,* that the charterer Kenray was exonerated by the same markings on account of the charter party's cesser clause.[10]

[9]So-called charter party bills of lading are those the bulk of whose terms are set forth in the charter party itself and not in the bill of lading. As between owner and charterer the bills themselves are only a receipt for cargo. Poor, *Charter Parties* 66 (4th Ed.).

[10]Cesser of liability not cesser of hire. At this juncture the Bank's argument proves too much: from it would follow the conclusion that Compania *never* had an enforceable right to collect hire from anyone since hire was not due until *after* cargo was loaded and bills of lading issued, at which point cargo and the consignees were exonerated because the bills were prepaid. On this reading, the arbitration clause [Exh. 1, Cl. 36], indeed the whole contract, becomes illusory.

The authorities cited by the Bank cannot be so broadly construed. In analyzing an estoppel, it is as important to ask "Who benefits?" as "Who is estopped?". The cases involving a "prepayment" estoppel are uniformly those involving a contest between a bona fide purchaser of the bills of lading and the issuer. This is the significance of *Toro Shipping Corp. vs. Bacon-McMillan Veneer Mfg. Co.* (5th Cir. 1966) 364 F.2d 928, where the court said, at page 930:

> "A review of the jurisprudence suggests, in essence, this broad equitable premise: The shipowner has a maritime lien for charter hire on cargo where a lien is reserved initially in the original charter and expressly incorporated into the bills of lading *except* as against a good faith purchaser of the cargo who had paid for it in advance without notice of the shipowner's rights."

The Bank points to no authority contradicting this limitation. It misreads *The ROBIN GRAY* (2nd Cir. 1933) 65 F.2d 376. That case involved an owner's attempt to exercise its lien against cargo consigned to bona fide purchasers who, in the course of a normal commercial transaction, purchased cargo by paying for prepaid on-board bills of lading. The so-called "factors" were actually "notify" parties under identical bills of lading [See facts set out in the companion case reported at 65 F.2d 375 at 376] whom the court treated quite properly as having "the same rights as purchasers" [65 F.2d at 378]. By no stretch of the imagination does the Bank fall into this category. There was no evidence at trial nor any finding by the court that that Bank gave anything of value in exchange for these documents of title.

A brief aside here on the general average lien which the vessel did assert at Taiwan: that lien arises from a

set of circumstances totally independent of the lien clause or the bills of lading. The owner's lien for general average is derived from the general maritime law [Lowndes and Rudolph, *General Average* 239 (9th Ed. 1964); Gilmore & Black, *Admiralty* 515] not as a matter of contract; its exercise is irrelevant to the issues before the Court.

(c) Finally, the Bank argues that freight monies are such only in the hands of the original obligor: once the obligor has paid, the shipowner's lien fails, the money is no longer "freight".

Preliminary to examination of this argument, it should be noted that the shipowner's lien against freight is never dependent on possession. It is axiomatic that the lien is exercised only when the freights are found in the hands of some third person [*e.g., United States v. Freights of the MOUNT SHASTA* (1927) 274 U.S. 466]. Once again, it is important to analyze the authority on which the Bank relies. One finds the cases cited are uniformly an attempt to procure *double* payment from an innocent third party. In essence, the same situation is presented as in the estoppel cases, *supra*. The third party shipper is to be protected. Note, for example, the language in *The AUDREY J. LUCKENBACH*[11] quoted and emphasized by the Bank at page 45 of its brief: had the freights been paid by the shipper, the situation *as to him* would be different. The *Norgulf* case,[12] upon which the

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[11] *Luckenbach Overseas Corp. vs. Subfreights of The AUDREY J. LUCKENBACH* (S.D. N.Y. 1963) 232 F. Supp. 572.

[12] *In re North Atlantic and Gulf S.S. Co.* (S.D. N.Y. 1962) 204 F. Supp. 899, *aff'd sub nom Schilling vs. A/S D/S Dannebrog* (2d Cir. 1963) 320 F.2d 628.

Bank places primary reliance is no broader. As already pointed out, the case involved competing claims against money in the hands of the shipper. The court held the shipowner's claim was superior to that of other claimants. The *dicta* quoted by the Bank [204 F. Supp. at 904] can only be read in this context, as the unquoted balance of the same paragraph makes clear. The court's attention was directed *solely* to the rights and duties of the owner and the shipper as against each other.

Hence the Bank's argument reduces to the single proposition that freight money altogether loses its character as "freight" as soon as it is paid. One is reluctant to dispute with so prominent an authority as Wharton Poor, but Compania is compelled to do so to the extent his statement [Poor, *Charter Parties* 48, quoted in Op.Br. 35] is understood to go beyond the decided cases. The court will note that Mr. Poor cites no American authority to sustain his statement. In fact, American authority is directly contrary to the statement made: under American law, freight monies remain "freights" in whosoever's hands they are found *so long as* they can be identified. The quotation taken by the Bank from Stephens, *Freights* 200 is likewise made in ignorance of American case law. Stephens was writing in 1907 and he uses as his sole authority an English case decided some years before that.

In the United States, the Admiralty has long recognized the principal that assets, including freights, may be traced into the hands of third parties. In *Bank of British North America vs. The Freights of The HUTTON* (2d Cir. 1905) 137 Fed. 534, the court makes the following statements:

> "It is familiar doctrine of the admiralty courts that a maritime lien attaches not only to the original subject of the lien, but also to whatever is substituted

> for it, and that the lienholder may follow the proceeds wherever he can distinctly trace them. 'Wherever there is a maritime lien upon property, it adheres to the proceeds of that property, into whose hands soever they may go, and these proceeds may be attached in the admiralty.' Benedict, Adm. Pract. § 290 (3d Ed.), where the authorities are collected in the note." 137 Fed. at 536.

> "The lien should survive . . . whether the freights were unpaid by the consignees and remained in their hands, whether they were in Perry's hands in the form in which they had been paid, or whether they were in his custody in the form of proceeds deposited in his bank account." 137 Fed. at 537.

The decision in *The JOHN ENA,* already cited, is to the same effect, that maritime liens may be asserted against monies which are passed from the hands of the original obligor into the hands of others; even in those cases where the person holding the monies claimed an interest therein as a matter of right.

And as was said in *The SURICO* (W.D. Wash. 1930) 42 F.2d 935 at 936:

> "[T]hat lien [against freights] is assertable in a court of admiralty, and follows the freight, and attaches to the proceeds and revenue that can be distinctly traced, and adheres to the proceeds in whose hands soever they may come."

The Bank's attempt to interpose factual distinctions between the present case and those cited above does not meet the principle of law involved: that the holder of a maritime lien may follow that lien into the hands of third parties just as Compania has done in this case.

In *The JACKIE HAUSE, supra,* the court *held* that the charterer had in fact no right to earned freights while hire remained unpaid.[13] How then can one standing in the charterer's shoes, knowing that hire was unpaid, urge that mere transfer of possession gives it an advantage it would not otherwise have? The answer is: it cannot.

To summarize, it is Compania's position that the lien given it under the charter party extends to cargo and to freight earned by cargo; that freight was indeed earned on SEARAVEN's cargo; that it was entitled to assert its lien against monies found in the Bank's hands (the question of identification not being at issue); and that nothing in the Bank's position gives it the privilege to assert a waiver or estoppel created for the benefit of someone else.

VI

THE BANK'S CONDUCT CLEARLY JUSTIFIED THE TRIAL COURT IN HOLDING IT AS A CONSTRUCTIVE TRUSTEE FOR COMPANIA'S BENEFIT.

The Bank's chief remaining argument is addressed to the proposition that nothing in the record sustains the court's finding it would be unjustly enriched at Compania's expense were Compania not paid its hire out of the funds which the Bank holds. To place this argument in perspective it is necessary first to recognize that, as between Compania and the Bank, Compania's claim to the funds not only is maritime, which the Bank's is not, but is a priority lien claim, which the Bank's is not either. *Freights of The KATE* (S.D. N.Y. 1894) 63 Fed. 707.

Indeed the position of the Bank is that of the charterer in whose shoes it stands. *That* position is explicitly subordinate to the rights of the shipowner.

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[13]Quoted *infra* at p. 20.

"Assuming (without deciding) that the claim and lien of the charterer passed by assignment to Cooper [the stevedore], the latter would then have a lien on the Barr sub-freights. As the opinion points out, however, the charterer could give up to Cooper no more than it had and whatever it had was subject to the superior and earlier lien of the owner." *Luckenbach Overseas Corp. vs. Subfreights of the AUDREY J. LUCKENBACH* (S.D. N.Y. 1963) 232 F. Supp. 572, 577 (on rehearing).

"The inchoate rights to freights of the 'Pacific Wave' which Pegor had assigned never ripened. Pegor was not the owner of the 'Jackie Hause' and under the voyage charter it did not become the owner pro hac vice; N. H. Shipping Corp. remained in full control and possession of the 'Jackie Hause', it disbursed her wages, fuel, stores, stevedoring and agency fees, and it issued the Bills of Lading marked 'freights as per charter party' signed by her Master. Having no rights to the freights of the 'Jackie Hause', Pegor could not assign them; as voyage charterer all it could assign was surplus freights earned, if any, after full payment of the vessel's hire and its lien on such surplus could not arise until that time." *N. H. Shipping Corp. vs. Freights of the JACKIE HAUSE* (S.D. N.Y. 1959) 181 F. Supp. 165, 170.

The Bank thus makes the bootstrap argument that its own misfeasance entitles it to obtain a priority to which it is not entitled. To do so it must dispute the trial court's findings, made from essentially uncontested testimony, that it instigated the sale of scrap in Taiwan to minimize a substantial loss it otherwise faced [F. 6; R. 219-20], that it solicited Kenray to arrange a charter fixture without letter of credit security in order to protect its — the

See also:

Restatement of Restitution § 160;
Ward vs. Taggart (1959) 51 Cal.2d 736;
Blair vs. Mahon (1951) 104 Cal.App.2d 44.

As Pound pointed out long ago, a constructive trust is remedial, "affording specific restitution of a received benefit in order to prevent unjust enrichment." Pound, *The Progress of the Law,* 33 Harv. L. Rev. 420, 421 (1920). This case presents at least three independent bases on which a constructive trust could be supported: constructive fraud [V Scott, *Trusts* § 462.4]; unjust enrichment [V Scott, *Trusts* § 462, at 3413]; breach of the confidential relationship between Kenray and the Bank. [West. *Cal. Civ. Code* § 2224]. Each of these bases is amply supported by the evidence and the court's findings as already noted.

The Bank's argument is actually one it should have addressed to the trial court: that Compania proved a case, but not enough of a case. Each of the cases it cites in support is distinguishable on its facts. For example, *Fowler vs. Security-First National Bank* (1956) 146 Cal. App.2d 37 involves an attempt to prove an oral agreement directly conflicting with a clear testamentary bequest. However, the true point is that the Bank does not — indeed cannot — urge the court's findings are clearly erroneous. This is the limit of its right as an appellant.

Reliance on the "creditor" cases[14] is likewise misplaced. None involve, as here, circumstances in which the holder of the trust *res* (the Bank) and the holder's assignor (Kenray) acquire specific property subject to a specific prior right. Contrast *the JACKIE HAUSE, supra.* Nor

[14]*Zirker vs. Baber* (1958) 161 Cal.App.2d 355; *Woodruff vs. Coleman* (D.C. 1953) 98 A. 2d 22; *McKey vs. Paradise* (1936) 299 U.S. 119.

do they involve facts where the holder manipulated circumstances so as to obtain possession of the trust *res* in the first instance. The trial court quite properly felt, as it held, that the Bank's conduct imposed on it the cost of the ocean freight.

VII

THE AWARD OF INTEREST WAS PROPER

The Bank's argument that interest was improperly awarded can be dealt with quickly. While it is true interest is a matter of discretion with an admiralty judge, it is routinely awarded in absence of specific facts.

The PRESIDENT MADISON (9th Cir. 1937) 91 F.2d 835, 845-48;

The STJERNEBORG (9th Cir. 1940) 106 F.2d 896, 898-99, aff'd 310 U.S. 268, 84 L.Ed. 1197, 60 S.Ct. 937 (1940);

Steeves vs. American Mail Line (9th Cir. 1946) 156 F.2d 59;

Medina vs. Erickson (9th Cir. 1955) 226 F.2d 475, 484;

Ursich vs. DaRosa (9th Cir. 1964) 328 F.2d 794, 798; *Firemen's Fund Ins. Co. vs. Standard Oil Co. of Cal.* (9th Cir. 1964) 339 F.2d 148, 159.

In urging that judgment could be liquidated only as against the sum of $96,750, the Bank ignores the fact that judgment was awarded against the entire *res,* an amount exceeding $500,000,[15] as well as *in personam* against it. It cites no authority for its proposition, contrary to the findings of the court below, that the court exercised its power *only in rem* and *only* against the sum of $96,750.

[15]As noted above, $145,000 was deposited by stipulation of the parties [R. 59].

VIII

CONCLUSION

At trial the Bank urged it was much like the corner grocer, innocent and naive in the ways of the sea. In somewhat more conservative language, it makes the same claim here. The evidence showed — and the court concluded — that the Bank was in fact the dark eminence standing behind the SEARAVEN's fateful voyage. This court has faced such a situation before. In *Northwest Marine Works vs. United States* [*The AUDREY II*] (9th Cir. 1962) 307 F.2d 537, the United States attempted to prefer its mortgagee rights by operating a vessel under foreclosure and *in custodia legis*. On that occasion this Court said, at page 541:

> "We do hold that when the government, as mortgagee, elected, instead of foreclosing, to continue the operation of the vessel, for its own purposes and benefit, it did so at its own risk, and not at that of appellant lien holders. It would be grossly unfair to permit the government, by proceedings that were essentially ex parte as to these appellants, to put the ship on the high seas upon whatever terms it might choose, as a sort of floating credit card payable to bearer, presumably able to incure [*sic*] maritime liens which would ordinarily, because later in time, prevail over those of appellants (*The St. Jago de Cuba,* 9 Wheat. 409, 416, 22 U.S. 409, 416, 6 L.Ed. 122), and then, by advancing moneys to pay those who would otherwise have such liens, gain priority over appellants."

Were this Court to accept the Bank's argument, then the Bank would be permitted to effect just such a fraud as was rejected in *The AUDREY II*.

But the law demonstrates the Bank's legal argument must be rejected. Compania properly exercised its lien rights in timely fashion. The Bank has no standing to contest this exercise. Its appeal should be denied.

Dated:

Respectfully submitted,

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES

By _____
JOHN C. MCHOSE